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No. 91-156

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

OTIE JONES, INDIVIDUALLY AND AS WARDEN OF THE MORGAN COUNTY REGIONAL CORRECTIONAL FACILITY, and M. C. HAMBY, ASSOCIATE WARDEN,
Petitioners,

v.

MARIAM LONG, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENTS' OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Should this Court grant review to decide the extent to which binding prison rules establish liberty interests, protected by the Due Process Clause, where there is a pending motion to amend the complaint, that, if granted, will allow respondents' claims -- that searches of family visitors to the prison were made without "reasonable suspicion" -- to be tried as a Fourth Amendment case, thereby rendering academic the Due Process issues raised by the petition?

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STATEMENT OF THE CASE

Respondents are three prison inmates and their wives and fiancé who were approved visitors at a Tennessee prison. Petitioners are the head warden and security warden at the prison who used their positions of authority to order strip, visual body cavity, and manual body cavity searches of the three women. Most significantly, the wardens ordered repeated warrantless searches of the female visitors, even after finding no contraband during any of the earlier searches.

Anita Simmers was subjected to visual body cavity searches on December 22, 23, 24 and 31, 1984, and on January 6, 1985, she was subjected to a manual body cavity search. Mariam Long was subjected to strip searches on July 13, 20 and 21, 1985. When she refused to undergo a manual body cavity search on October 6, 1985, Warden Jones sus-

pended her visits with her husband for 60 days. Karen Mills was subjected to a visual body cavity search on November 9, 1985, as well as on four dates earlier that year. The wardens ordered a manual body cavity search of her on October 5, 1985, but it was not conducted because Ms. Mills was having her menstrual period.

Tennessee prison regulations require "probable cause" -- defined as "more than a mere suspicion" -- before wardens can order such intrusive searches of visitors. TDOC Policy No. 506.06. Petitioners' Appendix ("Pet. App.") 28a. The wardens admitted that they authorized the searches without probable cause in violation of Tennessee prison regulations. Pet. App. 3a. In addition, the regulations, in mandatory terms, provide inmates a right to visits with approved visitors which the warden cannot suspend without "good cause." Pet. App. 53a, ¶ E5.

As construed by the court of appeals, the complaints in these three consolidated cases alleged two separate claims based on these facts. First, according to the court of appeals, respondents alleged that petitioners ordered the searches without probable cause and, therefore, violated the Fourth Amendment's prohibition against unreasonable searches. Second, respondents asserted that prison regulations prohibited searches in the intrusive manner involved here without probable cause and allowed inmates to have visitors unless there was good cause for denying them that right. After discovery had been completed, petitioners moved for summary judgment, claiming they were entitled to qualified immunity because their obligations were not clearly established at the time of the acts giving rise to these complaints. The district court denied that motion, and petitioners filed an interlocutory appeal.

The Sixth Circuit affirmed in part and reversed in part. First, it held that, for Fourth Amendment purposes, the standard governing searches of visitors was "reasonable suspicion," not "probable cause." Pet. App. 9a. It then construed

the complaints in these cases as relying on the absence of probable cause (*id.*), even though the complaints specified the more relaxed standard as a basis for the Fourth Amendment causes of action.*

Because of this ruling, the court then had to reach the alternative Fourteenth Amendment claim based on the wardens' repeated violations of their own regulations governing invasive searches and visitation rights. On this issue it agreed with respondents that they had a protected liberty interest for which there was no qualified immunity since the regulations clearly spelled out the wardens' obligations. Pet. App. 11a-12a. It is only this aspect of the ruling below on which petitioners seek review.

After the decision of the court of appeals, respondents filed a timely petition for rehearing, seeking to amend the decision to reflect the fact that their complaints asserted claims based on reasonable suspicion, a standard that was, as the court of appeals recognized, clearly established at the time that the actions of petitioners took place. Pet. App. 9a. When that request was denied without explanation, respondents moved the district court for leave to amend their complaints to correct what the court of appeals saw as a pleading defect. The district court has not acted on that

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* Defendants' policies and practices of compelling strip and manual body cavity searches of [plaintiff] in the absence of ***reasonable, articulable grounds to suspect*** her of attempting to smuggle drugs or other contraband by secreting them on her person is an infringement of her right to freedom of association and from unreasonable searches and seizures under the first, fourth and fourteenth amendments to the United States Constitution.

Long Complaint ¶ 61, Simmers Complaint ¶ 87, Mills Complaint ¶ 53. The italicized language was taken from *Hunter v. Auger*, 672 F.2d 668, 675 (8th Cir. 1982).

motion because of the pendency of this petition, although it is difficult to imagine the basis on which the motion could be denied. The evidence that will be offered under either the reasonable suspicion or the probable cause standard would be identical. *See* Fed. R. Civ. P. 15(a) ("leave shall be freely granted when justice so requires").

REASONS FOR DENYING THE WRIT

Review should be denied in this case because in all probability the correctness of the rulings on which *certiorari* is sought will not affect the outcome of this case. If, as seems likely, the district court grants the motion to amend, there will have to be a trial on the Fourth Amendment claim no matter how this Court might rule on the Fourteenth Amendment issues. Moreover, the facts regarding each of the searches and the basis, if any, on which petitioners ordered them will be the same under both legal theories. Thus, even if the Fourteenth Amendment claim were eliminated from the case, it would not alter the presentation of the proof on the remaining Fourth Amendment claim one iota. This Court should not devote its limited resources to resolving academic issues that will have no real effect on the final outcome of respondents' claims.

Even if the issues presented in the petition were not largely academic insofar as this case is concerned, and even if they independently merited review, this is not the appropriate case factually for resolving the question of the extent to which prison officials who violate their own regulations are liable under 42 U.S.C. § 1983. The Fourteenth Amendment's due process clause substantively prohibits and procedurally constrains state officials from taking arbitrary governmental action against citizens:

> The touchstone of due process is protection of the individual against arbitrary action of the govern-

ment.

Wolff v. McDonnell, 418 U.S. 539, 558 (1974).

The wardens in this case seek protection from liability for their groundless searches and arbitrary interferences with visitation. The State of Tennessee, by adopting a regulation restricting the wardens' discretion to order intrusive searches, explicitly recognized the importance of protecting visitors from arbitrary and capricious action by prison administrators. In addition, Tennessee gives inmates a protected interest in visiting with approved persons. These regulations also protect approved visitors from repeated, warrantless and intrusive searches ordered in direct violation of regulatory standards for such searches. Finally, the interests of both inmates and approved visitors in visitation cannot be suspended without good cause. Respondents are entitled to have the courts "insure that the state-created right is not arbitrarily abrogated." *Wolff v. McDonnell*, 418 U.S. at 557.

Although the courts have been understandably reluctant to interfere with state officials in their administration of prisons, there are plainly limits beyond which those officials cannot go. This is a case in which, if the factual allegations can be sustained at trial, damages are not merely permitted under the law, but essential to vindicate the rule of law. Whatever the limits may be beyond which the courts should not go in assessing civil liability for violation of prison rules, this case does not come close to reaching them. In short, this is a wholly inappropriate case to pass on the questions set forth in the petition.

The petition also raises the argument, for the first time in this protracted litigation, that the inmates could have used the inmate grievance procedure to contest the denial of visitation. The regulation that petitioners reproduced at Appendix 78a is not in the record in this case, and its applicability to these claims for damages was never assessed below. Moreover, on its face, the regulation covers only inmates. Three of the respondents are approved visitors, not inmates.

This Court should not rule on issues not considered by the lower courts and which, at most, would affect only some of the respondents.

Finally, the wardens ask the Court to grant them immunity so that "officials can act without fear of harassing litigation," Pet. at 9 n.2, citing *Davis v. Scherer*, 468 U.S. 183, 195 (1984). They claim, "[q]ualified immunity protects 'all but the plainly incompetent or those who knowingly violate the law.' *Malley v. Briggs*, 475 U.S. 335, 341 (1986)." *Id.* Even under their own criteria, petitioners are not entitled to the protection of the qualified immunity on which they rely. Their plea does not warrant the full consideration of this Court.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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